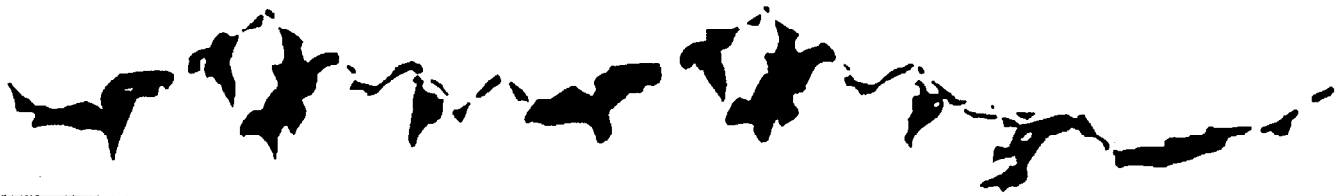

IPAMS
Independent Petroleum Association of Mountain States

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March 15, 1999

Mr. David S. Guzy,
Chief, Rules and Publications Staff
Minerals Management Service
Royalty Management Program
Rules and Publications Staff
P.O. Box 25165
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RE: Proposed Rulemaking - Appeals of MMS Orders
64 F.R. 1930, January 12, 1999

On Tuesday, January 12, 1999 the Department of the Interior proposed rules with respect to the captioned matter and requested public comments on or before March 15, 1999. The Independent Petroleum Association of Mountain States ("IPAMS") appreciates the opportunity to comment on the proposal and submits herewith its comments.

IPAMS is a non-profit, non-partisan association representing nearly 1,000 independent oil and natural gas producers, service and supply companies, and industry consultants in a thirteen-state Rocky Mountain region.

Subject to the following comments, IPAMS supports the proposed rule because it generally meets and cures the defects in the existing two-step royalty appeals process. The Royalty Policy Committee recommended that changes be made to the appeals process because the existing system lacked timely resolution of appeals, there was a lack of clarity and precision in some orders and there was a perception of the lack of independence and unfairness at the MMS Director level due to the surnaming process employed within the department before a decision was published.

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References to the sections of the proposed regulation will be to the published proposal as it appeared in the Federal Register for Tuesday, January 12, 1999, 64 Fed Reg. 1930. At page 1931, the Department specifically requests comments on whether, as an alternative to the procedures described in this proposed rulemaking, the current two-level administrative appeals process should be retained with amendments. IPAMS is opposed to returning to the two-level appeal process. The Royalty Policy Committee recommended that a one level appeal process be adopted and the Secretary of the Interior approved it. See the Secretary's letter of September 22, 1997, to David Blackmon, Chairman of the Royalty Policy Committee. The Secretary did not authorize the Department to seek comment on whether to retain the existing two-level system.

Section 4.905 of the proposed rule states that an order to provide documents or information would be final for the Department and not appealable within the Department. Although the proposal cites IBLA and judicial authority for the right of the Department to issue an order to provide documents, each such order raises specific concerns and exceptions for which an internal appeal within the Department would be more expeditious than the cost and time involved in going to court. Any order to produce documents always raises issues of relevance, privilege, confidentiality or proprietary nature of the documents. The proposed rule would have a decided impact on smaller independent members for whom going to court to resolve the issue would be costly and unnecessary. IPAMS urges the retention of the right to internally appeal an order to produce documents.

With respect to Section 4.906, the Department specifically requested comments on what methods of filing should be accepted and ways appellants could be provided with documentation of the receipt date other than a return receipt card. IPAMS suggests that the appellant file an original and one copy of an appeal document. The department would have 72 hours in which to affix a stamp file as an acknowledgment of the receipt of the appeal and return it to appellant. Frequently, green cards sent to Washington, D.C., are never returned and the appellant has to incur the expense of having the post office trace the missing card.

Section 4.911 deals with when the appeal commences. Under this proposal the appeal would not commence until the appellant has filed a notice of appeal, paid the filing fee and filed a statement of reasons. IPAMS disagrees with this proposal and believes instead that the appeal time should begin to run upon the filing of a notice of appeal.

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This is consistent with the current procedure for an appeal to the IBLA. Under the regulations governing appeals to IBLA, appeal time begins with filing the Notice of Appeal.

With respect to Section 4.914, what will MMS do after it receives an appeal, the proposal states that there would be no time requirement imposed upon the Department to notify appellants whether their appeal is timely filed. The Royalty Policy Committee Report very strongly recommended a ten day limit for this notification. This recommendation should be adopted. IPAMS believes a ten day period is a reasonable amount of time in which an appellant can be notified of the timely filing of an appeal. Prompt notification enables an appellant to proceed with the collection of documents for record development purposes and prepare for the settlement conferences.

In Section 4.919, concerning what the parties will do if they agree on the record contents, the Department specifically requests comments on whether parties should be required to "certify" the record within 30 days after the end of the record development conferences. While IPAMS believes that a complete record and its development is important to the appeals process, 30 days is insufficient time for such a certification. IPAMS submits that 60-90 days is more appropriate. Our concern is that once the record is certified, then it may not be opened except for good cause shown. IPAMS believes it is better to take extra time before certification so as to avoid delays that may be caused by disputes over the question of whether good cause exists to reopen the record.

With respect to Section 4.924 of the proposal, the Department seeks comments on whether the Royalty Simplification and Fairness Act requirement for "not less than one settlement consultation" should apply to all appeals. IPAMS believes it should, however the Royalty Simplification and Fairness Act does not apply to Indian royalties.

Section 4.929 proposes a change in the recommendation of the Royalty Policy Committee to have MMS issue an internal memorandum with respect to whether the Director concurs, rescinds or modifies an order. The change now proposed is that a letter decision will be issued. IPAMS is concerned with the use of the word "decision". The whole purpose of the Royalty Policy Committee recommendations to reform the appeal process was to have one decision issued in a royalty appeal and that by the Interior Board of Land Appeals. The word "decision" has specific meaning under the

Administrative Procedure Act and as such maybe entitled to deference and the presumption of regularity which attaches to formal agency orders and decisions. Therefore, the term "decision" should be clarified to mean that it is not a formal order of the Department which would have finality and ripeness attaching to it but is merely a statement of the Director's position with respect to an initial order. Moreover, it should not be a ruling on any issues raised by an appellant upon appeal.

Section 4.937, concerning whether an Assistant Secretary may decide an appeal, proposes to authorize the Assistant Secretary for Land and Minerals Management or the Assistant Secretary for Indian Affairs to decide an appeal by notifying the appellant, the MMS Dispute Resolution Division and the IBLA that he or she is taking jurisdiction of the appeal. This action by an Assistant Secretary may occur at any time up to 30 days before the date the appellant files its Statement of Reasons or an intervenor must file its Intervention Brief. Thereafter, the Assistant Secretary, rather than the IBLA would make the decision.

Throughout all proceedings with respect to the development of the Royalty Policy Committee recommendations, the public workshops and meetings which MMS held with respect to this rule, MMS officials consistently stated that the decision of an Assistant Secretary to take jurisdiction of an appeal would be the exception rather than the rule. The proposed rule does not confirm this and IPAMS requests that in publishing the final rule this policy be stated in the preamble to the final rule. If an Assistant Secretary takes jurisdiction of appeals on a frequent basis, then the whole purpose behind this reform would be lost. Moreover, there is the distinct possibility that many of the failings of the two step system will continue to occur. There is no limitation on an Assistant Secretary's ability to confer with anyone in the Department about a pending appeal and, as stated above, we would be back to the place where this effort began with all of its shortcomings.

In addition, the regulation must make it clear that an Assistant Secretary's assumption of jurisdiction cannot occur until the record has been settled and the statutory settlement conferences have been held.

Furthermore, IPAMS submits that the Department should develop published criteria for an Assistant Secretary to follow when taking jurisdiction of a pending appeal. These criteria should be published initially in proposed form and further public comment

should be sought before publication as a final rule.

Section 4.907, concerning how to file an appeal, discusses the Preliminary Statement of Issues which is recommended by the Royalty Policy Committee. It was the recommendation of the Royalty Policy Committee and it was approved by the Secretary that a Preliminary Statement of Issues would not be a legal brief and would not include the level of legal detail appellants currently provide in a Statement of Reasons. This section of the proposal refers the reader to Appendix A for an example of a Preliminary Statement of Reasons. The example is found on page 1981 of Vol. 64 of the Federal Register.

Paragraphs 2, 3 and 4 of Appendix A specifically require the appellant to insert citations to applicable case law, statutes, and/or regulations. Appendix A is contrary to the Secretary's letter and the report of the RPC. It is very clear from the Secretary's letter and even the Department discussion under Section 4.907 that the preliminary statement of issues need not be a legal brief. Therefore IPAMS recommends that the requirement to provide citations, statutes and regulations be removed from the example. IPAMS agrees that the Preliminary Statement of Issues should specifically identify the factual and legal disagreements with an MMS Order so that the MMS can obtain adequate information about the issues in the case.

Section 242.102 makes it optional with MMS whether to issue Preliminary Determination Letter with respect to the Auditor's findings. IPAMS submits that this step should be retained since we feel it will facilitate the appeal if an audited party can ascertain the audit exceptions determined by MMS or a state auditor at the earliest possible date. Knowledge of this information at an early date would facilitate settlement discussions.

March 15, 1999

David S. Guzy
Chief, Rules and Publications Branch
Royalty Management Program
Minerals Management Service

Other than the foregoing, IPAMS supports the foregoing proposal and urges its adoption.

Sincerely,

Hugh V. Schaefer, Chairman
IPAMS Royalties Committee

HVS:ljr